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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

DENNIS and GERDE AMOROSO,

No. 04-11303

Debtor(s).

Memorandum Estimating Claim

Debtors Dennis and Gerde Amoroso are principals of Dennis J. Amoroso Construction Co., Inc., a general contractor. Amoroso Construction was required to post construction bonds on many of its projects. Its bonding company was claimant Travelers Casualty and Surety Company of America, which has filed a claim for \$41 million in this case based on its losses and the Amorosos' personal indemnification. The debtors have objected, so the court must estimate the claim for purposes of voting on the debtors' plan. For the reasons stated below, the court estimates the claim in the full amount as filed.

Travelers established that due to financial problems of Amoroso it was forced to step in, take over and complete numerous projects. It is out of pocket a net of about \$39 million, with another \$2 million or so in further expected losses. These losses are the basis for its claim.

The Amorosos raise two arguments in objecting to the claim. First, they allege that Travelers either defrauded them or was somehow negligent¹ in extracting an extra \$3 million from them after they

¹Allegations of breach of contract based on the same facts have already been rejected by the district court before bankruptcy and appear without merit.

1 informed Travelers that they were in financial trouble and that Travelers would have demand on its
2 bonds. Second, they argue that Travelers' costs were excessive due to bad decisions and could have
3 been much less if Travelers had properly "mitigated its damages."

4 As to the first argument, the Amorosos have failed to demonstrate any actionable conduct by
5 Travelers. It is apparent that there was a great deal of discussion over how to address the situation, and
6 that the Amorosos believed that Travelers had agreed with them as to the best use of funds which the
7 Amorosos transferred to Travelers. However, no agreement was ever formalized. There is no basis for
8 the court to even infer any fraudulent intent on the part of Travelers. Moreover, the rapidly deteriorating
9 circumstances which the Amorosos ascribe to Travelers' failure to use the funds as the Amorosos
10 thought they should be used could have reasonably convinced Travelers that working with the Amorosos
11 was not its most prudent course of action. In the end, the amount at issue is so small in relation to
12 Travelers' overall losses² that Travelers' claim would be almost as large even if the court were to
13 ascribe some sort of bad faith conduct or negligence to Travelers.³

14 As to the second argument, the Amorosos seem to be asking the court to apply general contract
15 law rather than suretyship law. In California and just about everywhere else, a surety's alleged failure
16 to mitigate damages is not a defense in an action by the surety against its principal. *American States Ins.*
17 *Co. v. Glover*, 1992 WL 78786 *4 (6th Cir.1992) (per curiam) (surety's failure to mitigate losses is not a
18 defense to an indemnity action); *U.S. Fidelity & Guar. Co. v. Feibus*, 15 F.Supp.2d 579, 586 (M.D.Pa.
19 1998), aff'd 185 F.3d 864 (3rd Cir. 1999)(principal has no defense for surety's alleged making of
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21 ²The Amorosos are in denial that the total losses could possibly be anywhere near the \$41
22 million claimed by Travelers, but the declarations of Travelers' employees established to the court's
23 satisfaction, for estimation purposes at least, that its losses are that high and that all proper credits have
been applied.

24 ³All though not fully expressed, the Amorosos seem to believe that the court might find that it was
25 Travelers who caused most of the losses by failure to apply the \$3 million as the Amorosos wanted,
26 thereby giving the Amorosos a defense even if Travelers establishes \$41 million in out-of-pocket losses.
Not only is such a finding factually such a remote possibility as to have no impact on claim estimation,
but the court doubts that such a defense is permitted to a principal or indemnitor under suretyship law.

1 excessive payments or failure to investigate claims, even if grossly negligent); *Continental Cas. Co. v.*
2 *Guterman*, 708 F.Supp. 953, 954 (N.D.Ill. 1989)(surety had no duty to mitigate damages, so principal
3 cannot assert an affirmative defense based on the failure to mitigate); *Arntz Contracting Co. v. St Paul*
4 *Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 482 (surety may recover from principal for all
5 expenses except those incurred in bad faith); *General Ins. Co. of America v. Singleton* (1974) 40
6 Cal.App.3d 439, 443-44.

7 For the foregoing reasons, the court will estimate the claim of Travelers as being the amount of
8 the filed claim. Counsel for Travelers shall submit an appropriate form of order.

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Dated: February 18, 2005



Alan Jaroslovsky
U.S. Bankruptcy Judge